Supreme Court, U.S.
FILED

94 360 AUG 29 1994

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

HOSOYA FIREWORKS CO., LTD.,
a Foreign Corporation,

Petitioner,

v.

BERNARD BARONE, an Individual,
and HIGHLAND COUNTRY CLUB,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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64 pp

QUESTIONS PRESENTED FOR REVIEW

The Petitioner, a Japanese manufacturer, sold fireworks to an independent distributor in South Dakota who repackaged Petitioner's product for resale. A Nebraska resident drove to South Dakota to purchase fireworks to use in a display in Nebraska where Respondent Barone was injured. The Eighth Circuit, reversing the District Court, concluded Nebraska had personal jurisdiction over Petitioner under the "stream of commerce" doctrine. The questions presented are:

1. Does Petitioner's placement of its product into the "stream of commerce", without any other contact with the forum state whatsoever, constitute sufficient minimum contacts with the forum state to satisfy the Due Process Clause of the Fourteenth Amendment?

2. Even if the stream of commerce doctrine, without more, is sufficient on which to base personal jurisdiction, is a product which is brought into the forum state through the unilateral activity of the Respondent part of the "stream of commerce" sufficient to constitute an act of the Petitioner purposefully directed toward the forum state consistent with the requirements of the Due Process Clause of the Fourteenth Amendment?

3. Is the burden of proof properly applied under the Due Process Clause of the Fourteenth Amendment when the court finds personal jurisdiction under the "stream of commerce" doctrine even though Petitioner disputes it manufactured the product involved, Respondents offer no evidence to the contrary, and the Complaint alleges only that the product was manufactured "either" by another manufacturer (not a party) "or" Petitioner?

LIST OF PARTIES

Petitioner

Hosoya Fireworks Co., Ltd., a foreign corporation*

Respondents

Bernard Barone, an individual

Highland Country Club

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* Pursuant to Supreme Court Rule 29.1, Petitioner does not have parent or subsidiary companies.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Hosoya Fireworks Co., Ltd. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610 (8th Cir.

1994).[1] The opinion of the United States District Court for the District of Nebraska is unreported.[2]

JURISDICTION

The Court of Appeals entered its judgment on May 24, 1994, and thereafter entered an Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc on July 13, 1994.[3] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects an individual's liberty interest so that the individual is subjected to binding judgments only where such individual has established sufficient minimum contacts with the forum in which the judgment is entered.

The pertinent portion of the amendment states:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

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[1] See Appendix to this Petition at p. 1.

[2] See Appendix, p. 19.

[3] See Appendix, p. 24.

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Factual Background.

Petitioner is a Japanese corporation located in Japan which manufacturers fireworks. The only type of fireworks Petitioner ships to the United States is classified by the United States Department of Transportation as Class B explosives, and requires special permits to use. (A.10 & A.13)[4]

Rich Bros. Interstate Display Fireworks Co. (Rich Bros.) is a South Dakota corporation with its principal place of business in South Dakota. Rich Bros. is a completely separate and distinct entity from Petitioner, and does not act as Petitioner's agent. Petitioner does not have any financial or equity interest in Rich Bros. (A.12)

Respondent Highland Country Club (Highland) is located in Omaha, Nebraska and was preparing to put on a fireworks display on July 4, 1988. Respondent Barone is

[4] The Appendix references, for example "(A.10)", in this Petition for Writ of Certiorari are references to the Appendix submitted to the United States Court of Appeals for the Eighth Circuit. Petitioner has attached hereto as an Appendix only the lower federal court opinions, orders, findings of fact and conclusions of law pursuant to Supreme Court Rule 14.1(k). The 82-page record in the Eighth Circuit contains portions of depositions, responses to Interrogatories, and Affidavits.

a citizen of the State of Nebraska and was employed by Respondent Highland.

Respondent Highland had to obtain a federal permit from the Bureau of Alcohol, Tobacco and Firearms, a city permit, an air pollution permit, and a state permit to set off the fireworks. (A.30-31) Respondent thereafter drove from Nebraska to Rich Bros. in South Dakota to purchase and pick up the fireworks. After purchasing the fireworks, Respondent transported them into Nebraska where they were to be used in the July 4, 1988 display. (A.29-34)

When fireworks are sold by Petitioner to Rich Bros., Petitioner ships the fireworks directly to Rich Bros. in South Dakota from overseas. (A.50). According to Rich Bros.' representative, Michael Rich, approximately $16,000 worth of fireworks purchased from Petitioner by Rich Bros. were resold annually "into" Nebraska.[5] Petitioner's products were repackaged by Rich Bros., before sale, into Rich Bros.' own displays with other fireworks purchased by Rich Bros. from other manufacturers. (A43-44)

Respondent Barone was injured while assisting his employer, Respondent Highland, with the July 4, 1988 fireworks display in Omaha, Nebraska. Specifically,

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[5] Rich Bros. purchased fireworks from Petitioner during the years 1983 through 1988, inclusive, in the amount of just over $600,000 total for this entire period. (A.65) Rich Bros. therefore purchased on an annual basis approximately $100,000 worth of fireworks from Petitioner. Rich Bros. resold approximately 16 percent of these fireworks into Nebraska, or $16,000 per year. (A.66)

Respondents allege in their complaint that a six inch mortar shell "detonated prematurely, striking [Respondent Barone] in the head." (A.2) Respondents also allege that the shell involved "was manufactured by *either* China National[6] *or* Hosoya [Petitioner]." (Emphasis added). (A.2) No evidence was offered that Petitioner manufactured the fireworks involved in the July 4, 1988 accident.

Concerning Petitioner's contacts with Nebraska, the facts are undisputed that Petitioner does not directly transact business in Nebraska; does not contract to supply services or goods to Nebraska; does not have any agents or employees in Nebraska; does not send company representatives or agents to attend conventions or fairs in Nebraska; does not own, lease or maintain an office in Nebraska; does not advertise its products in Nebraska; does not mail or ship its products to Nebraska; does not maintain any stock of its products in Nebraska; does not transport goods through Nebraska; does not own or maintain any personal or real property in Nebraska; does not have a bank account in Nebraska; does not have its corporate name on office doors, buildings, or service trucks in Nebraska; does not have its name listed in any telephone, city, or business or trade directory in Nebraska; and does not purchase any equipment, goods or supplies in Nebraska. (A.10-13) Petitioner also submitted the Affidavit of Tsuneo Yanagi, Petitioner's Export Manager, wherein Mr. Yanagi states that Petitioner "does not directly derive any revenue from the State of

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[6] Service of process was never obtained by Respondents on China National.

Nebraska and does not know, or have any way of knowing, whether any of its products are ultimately used in the State of Nebraska"; and further that Petitioner "has never contemplated that its shipments into the United States would subject it to lawsuits in the State of Nebraska." (A.12-13).

Respondents claim that Petitioner is subject to *in personam* jurisdiction in the State of Nebraska because a product Petitioner may have manufactured found its way into Nebraska in the "stream of commerce" and caused injury. Thus, the analysis of the "stream of commerce" doctrine and its impact on *in personam* jurisdiction is the primary issue addressed by the Court of Appeals as set forth below.

B. Proceedings Below.

On November 14, 1988, Respondents filed this action pursuant to 28 U.S.C. § 1332 in the United States District Court for the District of Nebraska seeking to recover damages arising out of the July 4, 1988, accident. On April 8, 1992, approximately six months after Petitioner was first added as a Defendant,[7] it filed in the district court a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(2) for the reason that the District Court lacked personal jurisdiction over Petitioner. (A.7-51) On October 29, 1992, the District Court issued a Memorandum Opinion and Order granting Petitioner's motion to

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[7] On October 17, 1991, Respondents filed their Second Amended Complaint adding, for the first time, Hosoya Fireworks Co., Ltd. as an additional party Defendant.

dismiss specifically finding "that Defendant Hosoya [Petitioner] has no significant minimum contacts with the State of Nebraska."[8]

Respondents appealed the decision of the District Court to the United States Court of Appeals for the Eighth Circuit. On May 24, 1994, the Court of Appeals entered a judgment reversing the decision of the District Court. The Court of Appeals stated that the analysis of the case required the court "to take another look at a type of specific jurisdiction (as opposed to general jurisdiction . . .) that has been labeled 'stream of commerce' ".[9] The Court of Appeals relied on *Giotis v. Apollo of the Ozarks, Inc.*, 800 F.2d 660 (7th Cir. 1986), *cert. denied*, 479 U.S. 1092 (1987) in supporting its decision that the exercise of jurisdiction over Petitioner comported with due process. The Court of Appeals stated that Petitioner benefited from the distribution efforts of Rich Bros., and therefore, that Petitioner's "efforts to place its products in the stream of commerce" subjected it to jurisdiction in the State of Nebraska.[10]

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[8] See Appendix, p. 22.

[9] See Appendix, p. 5.

[10] Although the Court of Appeals relies upon *Giotis* in finding that *in personam* jurisdiction exists over Petitioner, the Court of Appeals apparently misinterprets how the fireworks in the instant case arrived in Nebraska. Specifically, the Court of Appeals states in footnote 3 of its judgment the "facts in this case actually provide greater support for a finding of personal jurisdiction than did the facts in *Giotis* because in that case the fireworks were sold into Minnesota and were then taken by the purchaser into Wisconsin, where the injury occurred. Had the injury occurred in Minnesota (and the suit been filed there), the facts would more closely mirror those of this case." Analogizing

The Court also concluded that because Petitioner had sold products to other distributors in the United States (none of which were in Nebraska) this "suggests an effort to reach much of the country through a limited number of regional distributors."[11] The Court of Appeals also stated that it disagreed that the uncertainty over who actually manufactured the offending firework precluded jurisdiction stating that the Respondents "need not prove that [Petitioner] has committed a tort in Nebraska; [Respondents] need simply establish a prima facie cause of action. . . . All we need decide is whether, given the allegation that either [Petitioner] or China National manufactured the offending firework, Nebraska could exercise personal jurisdiction over [Petitioner] consistent with due process."[12]

The Court of Appeals sought to distinguish *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987), wherein the United States Supreme Court examined the "stream of commerce" theory of personal jurisdiction over a foreign manufacturer; and *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369 (8th Cir. 1990), wherein the United States Court of Appeals for the

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to this case and based upon the Court of Appeals' statement, the court is apparently of the opinion that the fireworks were sold into Nebraska where the injury occurred and the action was filed. Based upon this statement, the Court of Appeals failed to recognize the undisputed fact that a Nebraska resident travelled interstate to South Dakota, purchased the fireworks in South Dakota, and thereafter brought the fireworks into Nebraska where they were involved in the injury.

[11] See Appendix, p. 9.

[12] See Appendix, p. 2, n.1.

Eighth Circuit previously applied the holding of *Asahi* finding that *in personam* jurisdiction did not exist over a Japanese manufacturer.

After the Court of Appeals issued its judgment, Petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied by the Court of Appeals on July 13, 1994.[13]

REASONS FOR GRANTING THE PETITION

The decision of the United States Court of Appeals for the Eighth Circuit is in conflict with decisions of the United States Supreme Court which include *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102 (1987) and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

Second, there are conflicting decisions proliferating rapidly in the lower courts, including some circuit courts, because of the varying interpretations of this Court's decisions on the "stream of commerce" doctrine. The need for guidance from this Court is acute because this issue surfaces so often, particularly in the areas of product liability and commercial transactions. The undisputed facts in this case present these issues clearly and offer a timely opportunity for the Court to provide that guidance in this very important question of federal law.

Third, the manner in which the Court of Appeals applied the burden of proof departs from traditional legal

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[13] See Appendix, p. 24.

concepts. The Court held that the Respondents met their burden of proof even though no evidence was offered, nor allegations made in the Complaint, to support a key element of any theory of special jurisdiction involving an allegedly defective product. We submit that this is such a departure from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision, as well as provide further instruction on the application of the burden of proof in personal jurisdiction proceedings.

A. The Court of Appeals' interpretation of the "stream of commerce" doctrine conflicts with decisions of this Court.

It is well settled that a state may exercise personal jurisdiction over a nonresident defendant consistent with due process only when the defendant has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The due process clause protects a defendant's "liberty interest" to the extent that the defendant should only be subjected to binding judgments in a forum where the defendant has established meaningful "contacts, ties, or relations." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). The purpose of the "minimum contact" requirement is to provide a defendant with fair warning that a particular activity may subject the defendant to the jurisdiction of a foreign sovereign. *Shaffer v. Heitner*, 433 U.S. 186 (1977). "[I]t is essential in each case that there be some act by which the

defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The assertion of personal jurisdiction must be consistent with traditional notions of fair play and substantial justice. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

Pursuant to existing Supreme Court decisions, Petitioner does not have sufficient minimum contacts with the State of Nebraska so that the exercise of *in personam* jurisdiction over it would violate the due process clause. The evidence wholly fails to demonstrate that Petitioner established any meaningful contacts, ties or relations with Nebraska. The undisputed facts show a complete lack of activity directed by Petitioner to Nebraska, and that the allegedly defective product found its way into Nebraska by the unilateral act of Respondent Highland Country Club. Under these facts, Petitioner contends the Court of Appeals rendered its decision in direct conflict with Supreme Court decisions.

The Court of Appeals found jurisdiction over Petitioner on the sole basis that it introduced its product into a "stream of commerce" which carried it into Nebraska. There was no other contact with Nebraska. In reaching this conclusion, the Court followed a Seventh Circuit decision which states:

> A seller at the head of a distribution network . . . satisfies the requisite foreseeability of due process where it "delivers its products into the stream of commerce with the expectation

> that [these products] will be purchased by consumers in the state."

Giotis v. Apollo of the Ozarks, Inc., 800 F.2d 660, 667 (7th Cir. 1986).

The Court of Appeals followed *Giotis* even though the Seventh Circuit acknowledged that "the Supreme Court's most recent opinion casts some doubt on the future viability of the stream of commerce theory." *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 946 (7th Cir. 1992). The Supreme Court case referred to, which was decided after *Giotis*, is *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102 (1987), which stated, quite differently from *Giotis*, that:

> [A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

480 U.S. at 112.

Even before the *Asahi* case, the Supreme Court spoke to this issue in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The Court framed the issue as follows:

> The issue before us is whether, consistently with the Due Process Clause of the Fourteenth Amendment, an Oklahoma Court may exercise in personam jurisdiction over a nonresident automobile retailer and its wholesale distributor in a products-liability action, when the defendants' only connection with Oklahoma is the fact that an automobile sold in New York to

> New York residents became involved in an accident in Oklahoma.

Id. at 287. In that case, the plaintiffs purchased a new Audi automobile from Seaway Volkswagen, Inc. in New York. Plaintiffs, who resided in New York, left the state for a new home in Arizona. As they passed through Oklahoma, another car rear-ended their Audi causing injury. The plaintiffs brought a products liability action in Oklahoma claiming a defective design and included as defendants the retail dealer, Seaway, and the regional distributor, World-Wide Volkswagen Corp. World-Wide was incorporated with its principal office in New York. It distributed vehicles, parts and accessories to dealers in New York, New Jersey and Connecticut.

The plaintiffs produced no evidence that either World-Wide or Seaway did any business in Oklahoma, but only that an extensive chain of Volkswagen's service centers existed throughout the country, including Oklahoma, facilitating travel there. The Supreme Court reversed the lower court's holding of jurisdiction over defendants stating:

> [T]he Due Process Clause "does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations." (Citation omitted) Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient occasion for litigation, the Due

> Process Clause, acting as instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

Id. at 294. The Court then emphasized that foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause. Specifically:

> If foreseeability were the criterion, a local California tire retailer could be forced to defend in Pennsylvania when a blowout occurs there (citation omitted), a Wisconsin seller of a defective automobile jack would be haled before a district court for damage caused in New Jersey (citation omitted), or a Florida soft drink concessionaire could be summoned to Alaska to account for injuries happening there (citation omitted). Every seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel.

Id. at 296.

The mere fact that Nebraska residents may have purchased Petitioner Hosoya's products from Rich Bros. in South Dakota is not sufficient to establish jurisdiction over Hosoya in Nebraska. As the *World-Wide* Court stated:

> [F]inancial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State. 444 U.S. at 298-99.

Here there is nothing to show Petitioner ever did anything to seek the "benefits and protections" of Nebraska

law. If Hosoya products found their way into Nebraska, it was through the independent acts of others.

The relatively recent pronouncement by this Court in *Asahi Metal Industry Co., Ltd. v. Superior Court, supra,* illustrates the application of the stream of commerce doctrine under the Due Process Clause to the exercise of personal jurisdiction over a foreign company. The Eighth Circuit, in its opinion, specifically refused to follow the main opinion in *Asahi* authored by Justice O'Connor because it was a "plurality opinion" which "did not command a majority of the court."[14] As a result, it also refused to apply the "stream of commerce" test as delineated in that opinion, which was clearly contrary to the *Giotis* case.

In that case, Asahi Metal Industry Co. Ltd. ("Asahi") was a Japanese corporation that manufactured tire valve assemblies for use as components in finished tire tubes. Asahi sold its components to a Taiwanese manufacturer, which, in turn, sold the finished tubes throughout the world, including California. Approximately twenty percent of the Taiwanese company's sales in the United States were in California. The plaintiff brought suit in California against the Taiwanese manufacturer and others for injuries he sustained when his motorcycle tire exploded. The Taiwanese manufacturer crossclaimed for indemnity against Asahi. The Court stated that the issue in the case was as follows:

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[14] See Appendix, p. 9, n.4 of court's opinion.

> This case presents the question of whether the mere awareness on the part of a foreign defendant [Asahi] that the components it manufactured, sold and delivered outside the United States would reach the forum state [California] in the stream of commerce constitutes "minimum contacts" between [Asahi] and [California] such that the exercise of personal jurisdiction "does not offend 'traditional notions of fair play and substantial justice.' "

Id. at 105. The Court stated that the "constitutional touchstone" in determining whether the exercise of personal jurisdiction comports with due process is whether the "defendant purposefully established 'minimum contacts' in the forum State." *Id.* at 108-09. In holding that the exercise of personal jurisdiction over Asahi by the California court would be in violation of due process, the Court reasoned that *"[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."* *Id.* at 112. (Emphasis added). The Court stated that Asahi's awareness that some of its products would be incorporated into tire tubes sold in California did not demonstrate that Asahi purposefully availed itself of the California market. The Court noted that Asahi did not do business in California; had no office, agents, employees or property in California; did not advertise or otherwise solicit business in California; and did not create, control or employ the distribution system that brought its valves to California. The Court concluded:

> [A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of

> placing the product into the stream into an act purposefully directed toward the forum State.

Id.

The Court also observed that the burden on Asahi would be severe if the Court exercised personal jurisdiction because Asahi would have to traverse the distance between its headquarters in Japan and the Supreme Court of California, and Asahi would have to submit its dispute to a foreign nation's judicial system. "The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Id.* at 115. The Court therefore held that the California Court could not exercise personal jurisdiction over Asahi.

In this case, the exercise of personal jurisdiction over Petitioner does not meet minimum contact standards or comport with fair play and substantial justice as outlined in *World-Wide* or *Asahi*. Petitioner has no contacts with Nebraska. The mortar shell in question, allegedly manufactured by either China National or Petitioner, was sold to Rich Bros., a South Dakota corporation. After Respondent Highland travelled to South Dakota and purchased the fireworks from Rich Bros., Respondent transported the fireworks to the State of Nebraska where they were ultimately used. Petitioner never contemplated that its sales of fireworks would subject it to lawsuits in Nebraska. (A.13) Nebraska is a state which does not even permit the sale of Class B fireworks to the general public. *See* Neb. Rev. Stat. § 28-1244 (Reissue 1989). As stated by the Court in *Asahi*, "[t]he placement of a product into the

stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." 480 U.S. at 112. In addition, Petitioner does not know and has no way of knowing whether any of its products will ultimately end up in Nebraska. But, assuming for the sake of argument that Petitioner did know that its products would end up in Nebraska, the Court stated in *Asahi* that the defendant's awareness that the stream of commerce may or will sweep the product into the forum state is not an act purposefully directed toward the forum state to create the necessary minimum contacts. Yet the Court of Appeals in this case clearly took exception to that rule and reached a contrary conclusion. Because the Court of Appeals refused to follow the *Asahi* precedent, it has created confusion as to the status of the stream of commerce doctrine in that Circuit,[15] as well as a direct conflict between the law in the Eighth Circuit and the Supreme Court.

The Supreme Court found in *Asahi* that the California courts did not have jurisdiction for two reasons. First, the minimum contacts necessary for due process were not met and, second, even if they were, "fair play and substantial justice" did not permit jurisdiction because of the

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[15] *See, e.g., Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369 (8th Cir. 1990) which the court neither overruled nor followed, but attempted to distinguish, even though the *Falkirk* court followed the *Asahi* decision stating that placing a product into the stream of commerce, without more, is insufficient. *See also, Soo Line R. Co. v. Hawkes Siddeley Canada, Inc.*, 950 F.2d 526 (8th Cir. 1991); *Gould v. P. T. Krakatau Steel*, 957 F.2d 573 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 304 (1992); *Humble v. Toyota Motor Co., Ltd.*, 727 F.2d 709, 710 (8th Cir. 1984).

limited interests of California in an indemnity action between two foreign entities, and the unique burdens on Asahi of defending itself in a foreign legal system. The Eighth Circuit Court attempted to distinguish *Asahi* on the basis of its second ground, but refused to follow the Court's holding on the first ground. It said that while it was "loath" to do so, it engaged in vote counting and concluded the Court was "split badly" on the minimum contacts issue and Justice O'Connor's decision only had a plurality, yet the Eighth Circuit had followed that portion of the decision in a case only three years earlier. *See* note 15, *supra*. This raises the clear question in the Eighth Circuit whether the *Asahi* plurality opinion is reflective of current law or not.

A further aspect of this case, with equal constitutional impact, is whether Petitioner "purposefully availed" itself of the benefit and protection of Nebraska laws when it was the Respondent which sought out the product and brought it to Nebraska. The Eighth Circuit did not even address these facts in the opinion, but appeared to be confused on the subject despite a very clear record. It is well established that Respondent Highland, through its own initiative, obtained the necessary federal and state permits to enable it to use Class B fireworks. It then sent its employees to the State of South Dakota to purchase fireworks directly from Rich Bros. and transported them from the State of South Dakota to the State of Nebraska where they caused injury. Even assuming the fireworks which were involved in the accident were in fact manufactured by Petitioner, and there is no evidence that they were, it was not a purposeful act *of Petitioner* which brought them to Nebraska. The product

was obviously not sent there, advertised there, or designed to be marketed there. Rather, it was the sole act of a completely unrelated independent third party which transported the alleged defective fireworks from South Dakota to Nebraska. Accordingly, *in personam* jurisdiction cannot exist over Petitioner or the chattel will be Petitioner's agent for service of process which *World-Wide* reminds us would violate due process.

The decision of the Court of Appeals is in direct conflict with decisions of the Supreme Court and creates confusion and uncertainty as to the application of the stream of commerce doctrine.

B. The Court of Appeals' interpretation of the "stream of commerce" doctrine furthers the existing split of authority among lower federal courts.

The Court of Appeals' interpretation of the stream of commerce doctrine is not only a departure from previous decisions in the Eighth Circuit, but it also furthers the existing split of authority among lower federal courts.

The Eighth Circuit decision in this case lines up with the Seventh Circuit's decision in *Giotis*, which the Seventh Circuit later viewed as being in doubt because of this Court's decision in *Asahi*. *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 946 (7th Cir. 1992).

Two other circuits appear to line up on the other side of the issue, while at least one appears to have deferred a decision on it.

The Eighth Circuit recognized one opposing case out of the Eleventh Circuit which was affirmed by that circuit's court of appeals. *Bond v. Octagon Process, Inc.*, 745 F. Supp. 710 (M.D. Ga. 1990), aff'd, 926 F.2d 1573 (11th Cir. 1991) (per curiam), *cert. denied*, 111 S.Ct. 2855 (1991). There, a plaintiff in Georgia was injured by a cleaning solvent manufactured by a New Jersey company which did no business in Georgia and had no contacts there. *World-Wide* and *Asahi* were cited by the court in denying personal jurisdiction. The court noted that *Asahi* had "narrowed" the stream of commerce doctrine from other versions in that "[m]erely placing an item in the stream of commerce without more, was . . . not . . . enough." 745 F. Supp. at 713. The Eleventh Circuit affirmed "on the basis of the district court's dispositive opinion. . . . " 926 F.2d at 1574.

The Eleventh Circuit, in another case, later said it did not have to reach the issue, noting "the current state of the law . . . is unsettled", because jurisdiction in that case was consistent with the "more stringent 'stream of commerce plus' analysis adopted by the *Asahi* plurality. . . . " *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1548 (11th Cir. 1993), *cert. denied*, 113 S.Ct. 2334 (1993).

The Fourth Circuit appeared hesitant to take sides on the breadth of the stream of commerce doctrine "because the issue is one that has closely divided the Supreme Court." *Federal Ins. Co. v. Lake Shore, Inc.*, 886 F.2d 654, 659 (4th Cir. 1989). However, in a recent unpublished opinion denying jurisdiction, it did hold, citing *Asahi*, that "the mere placement of products into the stream of commerce by a nonresident defendant is not an act purposefully

directed at the forum state." *Jarre v. Druckmaschinen, A.G.*, 19 F.3d 1430 (4th Cir. 1994) (unpublished disposition).[16]

The Federal Circuit avoided joining this "debate" because jurisdiction existed "under either version of the stream of commerce theory. . . . " *Beverly Hills Fan Company v. Royal Sovereign Corp.*, 21 F.3d 1558, 1566 (Fed. Cir. 1994). The court reviewed the history of the "debate", however, and noted that "[s]ince the decision in *World-Wide Volkswagen*, lower courts have split over the exact requirements of the stream of commerce theory." 21 F.3d at 1566. *Asahi* was cited as a reflection of that split.

There is also confusion regarding the current state of the law on the "stream of commerce" doctrine in the trial courts which deal with this issue on a regular basis. *See, e.g., Hupp v. Siroflex of America, Inc.*, 848 F. Supp. 744, 747 (S.D. Tex. 1994) ("blurred"); *U.S. v. Avondale Industries, Inc.*, 841 F. Supp. 180, 184 (M.D. La. 1993) ("no clear guidance"); *DeMoss v. City Market, Inc.*, 762 F. Supp. 913, 917 (D. Utah 1991) (*Asahi* "failed to reconcile divergent lower court interpretations"); *Hall v. Zambelli*, 669 F. Supp. 753, 756 (S.D. W. Va. 1987) (after *Asahi*, "continued viability of the stream of commerce theory" left in doubt).

The above are merely a sampling of the many cases which demonstrate confusion in this prolific area of litigation. Splits of authority occur not only between circuits, but within circuits. The lower courts have not resolved this issue on their own and the diversion and confusion continues to proliferate. This Court's guidance

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[16] See Appendix, p. 25.

on this important constitutional issue will contribute significantly to the efficient administration of justice.

C. The Court should exercise its supervisory powers on the burden of proof issue to assure the lower court will not perpetuate a standard which violates basic elements of procedural due process, and to correct an error.

The Eighth Circuit Court recognizes that the "burden of proof is on the party seeking to establish the court's in personam jurisdiction and the burden does not shift to the party challenging jurisdiction." *Gould v. P. T. Krakatau Steel*, 957 F.2d 573, 575 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 304 (1992); *Scullin Steel Co. v. National Railway Utilization Corp.*, 676 F.2d 309, 311 (8th Cir. 1982).

In this case, however, the Court disagreed that "the uncertainty over who actually manufactured the offending firework precludes jurisdiction. . . . "[17] Rather, the Court said, Barone "need simply establish a prima facie cause of action," citing *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 373 (8th Cir. 1990). But, assuming this is the rule, a *prima facie* case against a manufacturer is not established if it is not alleged in the complaint or by affidavit that the offending product was manufactured by the defendant. *See, e.g., Pennfield v. Meadow Valley Elec., Inc.*, 604 A.2d 1082 (Pa. Super. 1992), where the court held the lower court properly sustained preliminary objections to a complaint which sued two cable manufacturers while admitting the plaintiff did not know

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[17] See Appendix, p. 2, n.1.

which defendant manufactured the offending cable. The court refused to deviate from the rule "that a cause of action must fail unless defendant's conduct is shown to have been the proximate cause of plaintiff's injury." 604 A.2d at 1088. *See also, City of Philadelphia v. Lead Industries Ass'n., Inc.*, 994 F.2d 112, 123 (3rd Cir. 1993).

Here the Respondent alleged in the Complaint that *either* China National *or* Petitioner Hosoya manufactured the product. Petitioner denied it manufactured the product and denied jurisdiction. No affidavit or other proof was ever submitted to alter this speculation. If this standard prevails, the burden of proof becomes meaningless, particularly in a case of special jurisdiction where the origin of the offending product is pivotal to the minimum contacts issue.[18] The Court should correct this error and clarify this important standard to insure the proper administration of justice in future cases.

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[18] It would be similar to allowing an injured pedestrian to sue three nonresidents on the theory that *one* of them drove the vehicle which struck him in the forum state, and base jurisdiction on that allegation alone over all three nonresident defendants.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 93-1833

Bernard Barone, an individual; Highland Country Club; Plaintiffs-Appellants; v. Rich Bros. Interstate Display Fireworks Co., a South Dakota corporation; The People's Republic of China, a foreign corporation; China National Native Produce & Animal By-Products Import & Export Corporation, a Chinese corporation; Defendants; Hosoya Fireworks Co., Ltd., a foreign corporation; Defendant-Appellee.	*	Appeal From the United States District Court for the District of Nebraska.

Submitted: December 15, 1993

Filed: May 24, 1994

Before LOKEN, Circuit Judge, HEANEY, Senior Circuit Judge, and HANSEN, Circuit Judge.

HEANEY, Senior Circuit Judge.

Bernard Barone was injured when a fireworks display he was helping to set up went awry. Barone and his employer, the Highland Country Club of Omaha, Nebraska, (collectively "Barone") sued the distributor who sold Highland the fireworks, Rich Bros. Interstate Display Fireworks Co. of Sioux Falls, South Dakota, and two manufacturers of the fireworks, one of which is Hosoya Fireworks Co. of Tokyo, Japan.[1] Hosoya moved to dismiss for lack of personal jurisdiction, and the district court granted that motion. The district court refused to certify the question for appeal under 28 U.S.C. § 1292(b), however, so Barone agreed to the dismissal of Rich Bros. without prejudice, thereby paving the way for a final judgment, which Barone has now appealed to this court.

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[1] The other manufacturer, the People's Republic of China, doing business as the China National Native Produce and Animal By-Products Import and Export Corporation, ("China National") was never properly served, and was therefore dismissed from the case. *Barone v. Rich Bros. Interstate Display Fireworks Co.*, No. 8:CV88-810 (D. Neb. May 10, 1993). Hosoya argues that the uncertainty over who actually manufactured the offending firework precludes jurisdiction, but we disagree. Barone need not prove that Hosoya has committed a tort in Nebraska; he need simply establish a prima facie cause of action. *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 373 (8th Cir. 1990). All we need decide is whether, given the allegation that either Hosoya or China National manufactured the offending firework, Nebraska could exercise personal jurisdiction over Hosoya consistent with due process. *Id.*

I

The only facts of any significance are those that might be termed jurisdictional, *i.e.*, those facts that would support the exercise of jurisdiction over Hosoya in the state of Nebraska. We note initially that Hosoya has no office in Nebraska, no agent for service of process, no distributor. It does not advertise in Nebraska, nor does it directly send any of its products into Nebraska. Its products are sold into Nebraska, however, as the facts of this case demonstrate, and it is the process by which those products arrive in Nebraska (and elsewhere throughout the United States) that concerns us in this background section.

Hosoya sells fireworks throughout the United States and elsewhere.[2] During the years 1983-88 (the years immediately

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[2] Hosoya argues that many of the documents on which Barone relies were not properly before the district court because Barone failed to file them in compliance with a local rule. We find this argument unavailing for a number of reasons. First, "the district court has considerable leeway in the application of its local rules. Indeed, it is for the district court to determine what departures from its rules may be overlooked." *Silberstein v. IRS*, 16 F.3d 858, 860 (8th Cir. 1994) (citations, internal quotation marks, and alteration omitted). If this argument was presented to the district court (and we can find no evidence that it was), that court apparently rejected the argument when it indicated that it had "considered the briefs and evidence submitted by the parties." *Barone v. Rich Bros. Interstate Display Fireworks Co.*, No. 8:CV88-00810, slip op. at 1 (D. Neb. Oct. 29, 1992). If the court considered evidence that was improperly filed, it was within its discretion to do so, both under our precedents and under Local Rule 50 (allowing modification of the rules to avoid injustice). Second, as noted earlier, we find no evidence that Hosoya raised this argument to the district court. Hosoya cannot be heard to raise a violation of the lower court's local rules for the first time on appeal. *Jaroma v. Massey*, 873 F.2d 17, 22 (1st Cir. 1989).

preceding the accident, which occurred on July 4, 1988), Hosoya utilized nine distributors in six states (California, Indiana, Missouri, Ohio, Pennsylvania, and South Dakota). Those nine American distributors annually purchased between a quarter of a million and a million dollars worth of fireworks (averaging $640,000 annually over the six-year period), and constituted between fifty-one and ninety-two percent (averaging just over seventy percent) of Hosoya's fireworks business.

Rich Bros. purchased just over $600,000 worth of fireworks from Hosoya during this period, averaging just over $100,000 annually. Michael Rich, president of Rich Bros., informs us that sixteen percent of the fireworks purchased from Hosoya were eventually resold into Nebraska, which totals approximately $100,000 worth of fireworks over the six-year period, or $16,000 annually.

Rich Bros. is not a roadside fireworks distributor, although a related company does distribute fireworks in that manner, but instead sells its fireworks displays through its six regional salesmen and through a catalog by mail. The six salesmen are located in Nebraska, Iowa, North Dakota, Montana, and South Dakota. The fireworks displays sold by Rich Bros. are intended for use by municipalities or organizations that put on fireworks displays. Many of its catalogs are sent, for example, to small town fire departments because its experience has been that those institutions are often responsible for the fireworks displays at various community celebrations.

Business was conducted between Hosoya and Rich Bros. in the following fashion: Hosoya would send price lists, purchase terms, and shipping information to Rich

Bros. Hosoya also provided Rich Bros. with proof of compliance with various federal regulations. Although Hosoya disputes this, Rich informs us by affidavit that representatives of Hosoya visited him in his office in Sioux Falls for the purpose of soliciting the purchase of their fireworks.

II

We review dismissals for lack of personal jurisdiction de novo, and, like the district court, we simply look to the nonmoving party to make a prima facie showing of jurisdiction. *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1387 (8th Cir. 1991). Nebraska has construed its long-arm statute to confer jurisdiction to the limits of due process, *see Keith v. Freiberg*, 492 F. Supp. 65, 66-67 (D. Neb.) (citing *Stucky v. Stucky*, 185 N.W.2d 656 (Neb. 1971)), *aff'd*, 621 F.2d 318 (8th Cir. 1980), so our familiar two-part analysis in diversity cases of whether the forum state's long-arm statute is satisfied and, if so, whether the exercise of jurisdiction comports with due process, collapses into the single question of whether due process would be violated by the exercise of jurisdiction over Hosoya in this case. *Soo Line R.R. Co. v. Hawker Siddeley Canada, Inc.*, 950 F.2d 526, 528 (8th Cir. 1991). The necessary analysis may further be delineated by noting that this case requires us to take another look at a type of specific jurisdiction (as opposed to general jurisdiction, *see Sondergard v. Miles, Inc.*, 985 F.2d 1389, 1392 (8th Cir. 1993)), that has been labeled "stream of commerce." *See Wines v. Lake Havasu Boat Mfg., Inc.*, 846 F.2d 40, 43 (8th Cir. 1988).

Barone directs us to a Seventh Circuit decision, *Giotis v. Apollo of the Ozarks, Inc.*, 800 F.2d 660 (7th Cir. 1986), *cert. denied*, 479 U.S. 1092 (1987), that appears to be on all fours with the case before us. To that case, Giotis was injured at a Fourth of July party in Wisconsin by fireworks that had been brought to the party by a Minnesotan, who had in turn purchased the fireworks by mail from a national distributor, Capitol Fireworks Company. (We note that fireworks were illegal in both Minnesota and Wisconsin at the time, but this apparently was no impediment to Capitol, which shipped the fireworks to a Minnesota address.)

The fireworks in question had been purchased by Capitol from either Apollo, a Missouri corporation with retail outlets in Missouri, or Red Rocket, a Missouri corporation with offices in Missouri and Louisiana. Red Rocket and Apollo distributed fireworks into ten and fifteen different states, respectively, but neither distributed fireworks into Wisconsin. There was no evidence in the record that either was aware of the scope of Capitol's sales efforts, *see id.* at 672 (Barker, J., concurring and dissenting), but the court nonetheless found that jurisdiction over both Red Rocket and Apollo comported with due process.

The due process clause requires that there be "minimum contacts" between the nonresident defendant and the forum state before the latter may exercise jurisdiction over the former. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980).

> Sufficient contacts exist when the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being

> haled into court there, and when maintenance of the suit does not offend traditional notions of fair play and substantial justice. In assessing the defendant's "reasonable anticipation," there must be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Soo Line, 950 F.2d at 528-29 (citations and internal quotation marks omitted).

The *Giotis* court held that when a seller, such as either Apollo or Red Rocket, heads a distribution network, thus "realiz[ing] the much greater economic benefit of multiple sales in distant forums, of which the purchase by the particular buyer who has brought suit is merely one example," its activities in that role may "satisfy the purposeful availment test" and it may therefore be sued by an injured buyer in the buyer's forum. 800 F.2d at 667. Although

> [s]uch a seller, because of intervening levels of distribution, may not have mentally formed a purpose to sell its product to the particular individual buyer who is suing it, . . . the seller surely has purposefully chosen to sell generally to buyers in the forum state and reaps the economic benefit of doing so. A seller at the head of a distribution network thus satisfies the requisite foreseeability of due process where it "delivers its products into the stream of commerce with the expectation that [these products] will be purchased by consumers in the forum state."

Id. (quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 473 (1985), which in turn quoted *World-Wide Volkswagen*, 444

U.S. at 297-98). Apollo and Red Rocket were such sellers, in the *Giotis* court's opinion, in that they "derived the same economic benefits from Capitol's wide scope of sales efforts as Capitol did," and there was "no evidence that [they] were unaware of this scope." *Id.* at 668.

Applying the *Giotis* decision to this case is quick work,[3] if it represents the applicable law. Hosoya certainly benefited from the distribution efforts of Rich Bros., and although Hosoya claims to have had no actual knowledge that Rich Bros. distributed fireworks into Nebraska, such ignorance defies reason and could aptly be labeled "willful."[4] South Dakota is not a particularly

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[3] The facts in this case actually provide greater support for a finding of personal jurisdiction than did the facts in *Giotis* because in that case the fireworks were sold into Minnesota and were then taken by the purchaser into Wisconsin, where the injury occurred. Had the injury occurred in Minnesota (and the suit been filed there) the facts would more closely mirror those of this case.

[4] The Fifth Circuit's explanation of the insignificance of this distinction in the context of personal jurisdiction bears repeating:

> The traditional equivalence between "know" and "should have known" in our jurisprudence suggests that, for purposes relevant to this case, it is a distinction that makes no difference. The ultimate test of in personam jurisdiction is "reasonableness" and "fairness" and "traditional notions of fair play and substantial justice," [*International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)]. In applying such a test, it is a matter of common sense that there should be no distinction between "know" and "should have known." We cannot say that a potential defendant who actually *knows* his products will ultimately reach the forum state any more "purposefully avails itself of

populous state; Sioux Falls is conveniently located within short distance of three other states, and the very name of the distributor is "Rich Bros. *Interstate* Display Fireworks Co." In addition, the location of Hosoya's distributors suggests an effort to reach much of the country through a limited number of regional distributors. If Hosoya's two Missouri distributors and its Ohio distributor similarly distribute Hosoya's fireworks on a regional scale, which it is fair to assume they do, Hosoya has managed to cover the Midwest rather successfully, and it is difficult to imagine that such strategically placed distributors would be chosen merely by chance. Rather, it is evidence of Hosoya's efforts to place its products in the stream of

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> the privilege of conducting activities [there]", *Hanson v. Denckla*, 357 U.S. [235, 253 (1958)], than a potential defendant who merely *should have* known.

Oswalt v. Scripto, Inc., 616 F.2d 191, 200-01 (5th Cir. 1980) (emphasis in original) (footnotes omitted). One district court opinion suggests that the Supreme Court overruled Oswalt and similar progeny of *World-Wide Volkswagen* in *Asahi Metal Indus. Co. v. Superior Ct. of Calif.*, 480 U.S. 102 (1987). See *Bond v. Octagon Process, Inc.*, 745 F. Supp. 710, 714-45 (M.D. Ga. 1990), *aff'd*, 926 F.2d 1573 (11th Cir.) (per curiam), *cert. denied*, 111 S. Ct. 2855 (1991). As we discuss in the text *infra*, a plurality of the Court in *Asahi* indicated its desire to limit this line of cases, but Justice O'Connor failed to muster a majority on that issue. Neither the Fifth Circuit nor the Eleventh Circuit has explicitly abrogated *Oswalt*, nor has the Ninth Circuit overruled its similar decision in *Hedrick v. Daiko Shoji Co.*, 715 F.2d 1355 (9th Cir. 1983). *See Western Helicopters, Inc. v. Rogerson Aircraft Corp.*, 715 F. Supp. 1486, 1490 (D. Or. 1989) (although Justice O'Connor's plurality opinion in Asahi disapproved of the *Hedrick* approach, that opinion did not command a majority of the Court; "[t]herefore, *Hedrick* has not been overruled and remains the controlling case law in the Ninth Circuit.").

commerce throughout the Midwest and other parts of the country as well.

The question remains whether the *Giotis* court's holding is available to us as persuasive precedent in this circuit. Hosoya argues that two intervening decisions, one by the Supreme Court and a subsequent one by this court, suggest to the contrary. As we shall explain, we disagree.

The supreme court most recently examined the "stream of commerce" theory of personal jurisdiction in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987). Our court applied the Asahi court's holding in *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369 (8th Cir. 1990). These cases involved similar, though not identical, facts. In both cases, a manufacturer of a component part sold that part to another company which in turn sold its final product into the forum state. In *Asahi*, these sales into the forum state were of significant quantity and continued for several years, while in *Falkirk* the sale was a single occurrence. In both cases the ultimate consumers were injured, allegedly due to defects in the component parts, and sued the component part manufacturers in the states in which the injuries occurred.

The plaintiff in *Asahi* eventually settled his suit, but the action for indemnity between the Taiwanese company that sold the final product into California and the Japanese company that manufactured the allegedly defective component part remained to be litigated. The Supreme Court eventually held that the exercise of personal jurisdiction over the component manufacturer in a California state court did not comport with due process because it

was unreasonable to subject the Japanese company to suit in California when neither the plaintiff nor the forum state had any significant interest in the outcome and when it would place a severe burden on the Japanese company. *Asahi*, 480 U.S. at 114. The Court split badly on the question of whether the Japanese company had sufficient contacts with the forum state, with four justices indicating that it did not, *id.* at 112 (opinion of O'Connor, J.), four justices indicating that it did, *id.* at 117 (opinion of Brennan, J.), and three justices indicating that, although it was unnecessary to reach the question, they believed that "a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute 'purposeful availment' even though the item delivered to the forum State was a standard product marketed throughout the world." *Id.* at 122 (opinion of Stevens, J.).

In short, *Asahi* stands for no more than that it is unreasonable to adjudicate third-party litigation between two foreign companies in this country absent consent by the nonresident defendant. Should one engage in vote counting, which we are loath to do, it appears that five justices agreed that continuous placement of a significant number of products into the stream of commerce with knowledge that the product would be distributed into the forum state represents sufficient minimum contacts to satisfy due process. In doing so, those justices simply followed the Court's earlier statement in *World-Wide Volkswagen* that when a manufacturer or distributor attempts to serve a market "directly or indirectly . . . , it is not unreasonable to subject it to suit in [that market] if its allegedly defective merchandise has there been the source

of injury to its owner or to others." 444 U.S. at 297. In any event, the *Asahi* decision cannot be held to undermine the holding in *Giotis*. *See Dehmlow v. Austin Fireworks*,963 F.2d 941, 946 (7th Cir. 1992) ("Because the Supreme Court established the stream of commerce theory, and a majority of the court has not yet rejected it, we consider that theory to be determinative."); *cf. Boit v. Gar-Tec*, 967 F.2d 671, 682-83 (1st Cir. 1992) (holding that *Asahi* did not undermine an earlier First Circuit decision that limited the stream of commerce theory).

This court's decision in *Falkirk* is similarly distinguishable from the facts of this case. There a single component part manufactured by the defendant was incorporated by a third party into a piece of equipment sold to the plaintiff in the forum state.[5] No evidence was presented indicating that the defendant either knew or should have known that its component part would end up in the forum state, nor was there evidence that the defendant had availed itself in any way of the benefits of the laws of the forum state. *See Falkirk*, 906 F.2d at 375. Were the facts in this case precisely like those in *Giotis i.e.*, had someone purchased Hosoya's products from Rich Bros. and taken those fireworks to a state that was outside of Rich Bros. and Hosoya's distribution scheme where the fireworks then caused injury to a third party – *Falkirk* might well preclude jurisdiction, for in both cases

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[5] The defendant had one other contact with the forum state, but it was unrelated to the dispute and therefore irrelevant to the consideration of whether the forum state could exercise specific jurisdiction over the defendant. *See Falkirk*, 906 F.2d at 374.

the contacts with the forum state would be attenuated, random, or fortuitous, see *Burger King*, 471 U.S. at 475; but in this case the defendant poured its products into regional distributors throughout the country, and now would have this court believe that it had no idea its products were being distributed into neighboring states.

Hosoya has reaped the benefits of its network of distributors, and it is only reasonable and just that it should now be held accountable in the forum of the plaintiff's choice (as long as that choice of forum comports with due process, which we believe it does). More than reasonable foreseeability is at stake here, as it must be under existing case law, *see Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 656 (8th Cir. 1982), for Hosoya has purposefully reaped the benefits not only of South Dakota's laws, but of Nebraska's as well.

Having found both *Asahi* and *Falkirk* factually distinguishable from the instant case and being persuaded of the correctness of the Seventh Circuit's analysis and its applicability to this case, we adopt the reasoning in *Giotis* and find Hosoya subject to personal jurisdiction in Nebraska for purposes of this suit.

III

In *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222-23 (1957), the Supreme Court recognized that

> [t]oday many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business

> conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

In *World-Wide Volkswagen*, the Court noted that these "historical developments . . . have only accelerated in the generation since [*McGee*] was decided." 444 U.S. at 293. Although a generation has not quite passed since *World-Wide Volkswagen* was decided, the acceleration in the internationalization of commerce is apparent. In this age of NAFTA and GATT, one can expect further globalization of commerce, and it is only reasonable for companies that distribute allegedly defective products through regional distributors in this country to anticipate being haled into court by plaintiffs in their home states. Accordingly, we reverse the district court's finding that Hosoya is not subject to personal jurisdiction in Nebraska for purposes of this suit and remand for further proceedings consistent with this opinion.

A true copy.

Attest:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BERNARD BARONE, etc., et al., Plaintiffs, vs. RICH BROS. INTERSTATE DISPLAY FIREWORKS CO., etc., et al., Defendants.	)	S:CV88-810 MEMORANDUM OPINION (Filed Dec. 03, 1992)

This matter is before the Court on the Motions to Certify Judgment filed by the Defendant/Crossclaimant Rich Bros. Interstate Display Fireworks Co. ("Rich Bros."), (Filing No. 100), and the Plaintiffs Bernard Barone and Highland Country Club, (Filing No. 101). The Court has considered the briefs submitted to the Court, noting that the Defendant Hosoya Fireworks Co., Ltd. ("Hosoya") opposes the motions.

I. FACTUAL BACKGROUND

On October 29, 1992 this Court granted the motion to dismiss the second amended complaint and the motion to dismiss crossclaim filed by the Defendant Hosoya. In so ruling, the Court concluded that this Court lacks personal jurisdiction over Hosoya, who allegedly might have sold a mortar shell to Defendant Rich Bros.,[1] a South Dakota

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[1] In its brief in opposition to the motions in question, Defendant Hosoya respectfully suggests that the Court might deem it necessary or appropriate to clarify the following

corporation, which in turn sold the mortar shell to the Plaintiff Highland Country Club.

The Defendant/Crossclaimant Rich Bros. and the Plaintiffs now move to certify judgment pursuant to Federal Rule of Civil Procedure 54(b).

II. DISCUSSION

The federal rules provide that when multiple parties are involved, "the court *may* direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54(b). Typically, parties request such entry of judgment in order to proceed with an appeal. In this case, the moving parties state that judgment should be certified in order to avoid holding two trials and to settle a divergence of opinion present in this Court as a result of this Court's memorandum opinion and order regarding the motions to dismiss for lack of personal jurisdiction.

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statement in the Court's memorandum and order: "The six-inch mortar shell in question was sold by Hosoya to Defendant Rich Bros. . . . " (Filing No. 98). The Court finds the suggestion appropriate, and shall amend the first full sentence on page 2, lines 1-4, of the memorandum and order as follows, to clarify that the pleadings state that either China National or Hosoya sold the mortar shell to Rich Bros.: "The six-inch mortar shell was sold to Defendant Rich Bros. Interstate Display Fireworks Co. ("Rich Bros."), a South Dakota corporation, which in turn sold the shell to the Country Club."

Requests for entry of final judgment under Rule 54(b) are discretionary with the Court and only to be granted "sparingly." *Transamerican Refinery Corp. v. Carboline Co.*, 1990 U.S. Dist. LEXIS 14242, at *3 (E.D. La. Oct. 18, 1990); 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* §§ 2655, 2656 & 2660 (2d ed. 1983). More specifically, in discussing the purpose of judgments under Rule 54(b), it has been stated that such judgments should not be entered as a mere accommodation to counsel and should only be entered " 'where the problem and circumstances are of "an exceptional nature" [to] avoid some "perceptible danger of hardship or injustice through delay which would be alleviated by immediate appeal." ' " *Transamerican Refinery Corp.*, 1990 U.S. Dist. LEXIS, at *3 (quoting *Bank of New York v. Hoyt*, 108 F.R.D. 184, 187 (D.R.I. 1985)).

The Court finds that the argument that the Court might avoid two trials is based on certain suppositions and does not rise to the level of the showing required under Rule 54(b). Furthermore, the Court disagrees that this Court's memorandum opinion and order created a divergence of opinion within this Court. Even assuming that a divergence was created, the Court finds that certification of judgment under Rule 54(b) would not be appropriate, given the lack of a required showing of hardship or injustice.

IT IS ORDERED:

1. The Motions to Certify Judgment filed by the Defendant/Crossclaimant Rich Bros. Interstate Display Fireworks Co., (Filing No. 100), and the Plaintiffs Bernard Barone and Highland Country Club, (Filing No. 101), are denied; and

2. The first full sentence on page 2, lines 1-4, of the previously issued memorandum opinion and order is hereby amended to read as follows: "The six-inch mortar shell was sold to Defendant Rich Bros. Interstate Display Fireworks Co. ("Rich Bros."), a South Dakota corporation, which in turn sold the shell to the Country Club."

DATED this 3rd day of December, 1992.

BY THE COURT:

/s/ William G. Cambridge
WILLIAM G. CAMBRIDGE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BERNARD BARONE, et al., Plaintiffs, vs. RICH BROS. INTERSTATE DISPLAY FIREWORKS CO., et al., Defendants.	)	8:CV88-00810 MEMORANDUM OPINION AND ORDER (Filed Oct. 29, 1992)

This matter is before the Court on the motion to dismiss the second amended complaint filed by the Defendant Hosoya Fireworks Co., Ltd. ("Hosoya"), (Filing No. 68), and the motion to dismiss crossclaim filed by the Defendant Hosoya, (Filing No. 82). The Court has considered the briefs and evidence submitted by the parties.

I. FACTUAL BACKGROUND

On July 4, 1988 the Plaintiff Bernard Barone, an employee of the Plaintiff Highland Country Club ("Country Club"), was assisting in a fireworks display at the Country Club. Barone allegedly attempted to place a six-inch mortar shell into its tube when it detonated prematurely, allegedly striking Barone in the head and injuring him. (Filing No. 62). The six-inch mortar shell was allegedly manufactured either by China National Native

Produce and Animal By-products Import and Export Corporation – Guangung Native Produce Branch, Guangzhou, China ("China National"),[1] or by the Defendant Hosoya.[2] (Filing Nos. 62). The six-inch mortar shell in question was sold by Hosoya to Defendant Rich Bros. Interstate Display Fireworks Co. ("Rich Bros."), a South Dakota corporation, which in turn sold the shell to the Country Club. (Filing Nos. 62 and 63).

Rich Bros. filed a crossclaim against Hosoya, (Filing No. 75), and Hosoya has filed motions to dismiss, (Filing Nos. 68 and 82), the second amended complaint and the crossclaim for lack of personal jurisdiction.

II. DISCUSSION

The Nebraska long arm statute provides:

> A court may exercise personal jurisdiction over a person:
>
> (1) Who acts directly or by an agent, as to a cause of action arising from the person:
>
> (a) Transacting any business in this state;
>
> (b) Contracting to supply services or things in this state;
>
> (c) Causing tortious injury by an act or omission in this state;

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[1] This corporation is owned and operated by the Defendant The Peoples Republic of China.

[2] Hosoya is a foreign corporation with its headquarters in Tokyo, Japan.

> (d) Causing tortious injury in this state by an act or omission outside this state if the person regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;
>
> (e) Having an interest in, using, or possessing real property in this state; or
>
> (f) Contracting to insure any person, property, or risk located within this state at the time of contracting; or
>
> (2) Who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States.

Neb. Rev. Stat. § 25-536 (Reissue (1989).

The objective of the Nebraska legislature in enacting subsection 25-536(2) was to extend the jurisdiction of Nebraska courts over nonresident defendants to the fullest extent possible under the due process constraints of the Constitution. *Keith v. Freiberg*, 492 F. Supp. 65, 67 (D. Neb.), *aff'd*, 621 F.2d 318 (8th Cir. 1980). To cast light on the due process considerations, the Eighth Circuit Court of Appeals has proposed a five-factor analytical method for determining whether due process principles will be offended if the nonresident defendant is required to answer in a particular forum. *Aaron Ferer & Sons Co., v. Atlas Scrap Iron & Metal Co.*, 558 F.2d 450, 453 (8th Cir. 1977). The five factors are: (1) the nature and quality of the contacts with the forum state; (2) the quantity of the contacts with the forum state; (3) the relation of the cause

of action to the contacts; (4) the interests of the forum state in providing a forum for its residents; and (5) the convenience of the parties. *Id.* Essentially, due process considerations are satisfied when a nonresident defendant has "fair warning" that an act or omission may subject the defendant to the jurisdiction of a foreign forum, and the defendant has purposefully exercised the privilege of conducting activities within the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985); *Austad Co. v. Pennie & Edmonds*, 823 F.2d 223, 226 (8th Cir. 1987).

In this case, the Court finds that the Defendant Hosoya has no significant minimum contacts with the State of Nebraska. Specifically, the Court finds that Hosoya has not transacted any business in Nebraska and has no agents or employees in Nebraska. Also, Hosoya does not: maintain an office in Nebraska; advertise in Nebraska; transport goods through Nebraska; lease or own any personal or real property in Nebraska; maintain a listing in any telephone, city, business or trade directory in Nebraska; or derive any revenue from Nebraska. Hosoya has never purchased any equipment, goods or supplies in Nebraska. Hosoya has itself never shipped any products into Nebraska and does not know or have any way of knowing whether any of its products are ultimately used in Nebraska. Last, Hosoya does not maintain any financial or equity interest in Rich Bros. and does not control the distribution of Rich Bros.' goods.

For these reasons, the Court finds that the motions to dismiss filed by the Defendant Hosoya should be granted.

IT IS ORDERED that the motion to dismiss the second amended complaint filed by the Defendant Hosoya Fireworks Co., Ltd. ("Hosoya"), (Filing No. 68), and the motion to dismiss crossclaim filed by the Defendant Hosoya, (Filing No. 82), are granted.

DATED this 29 day of October, 1992.

BY THE COURT:

/s/ William G. Cambridge
WILLIAM G. CAMBRIDGE
United States District Judge

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 93 1833NEO

Bernard Barone, an individual, Highland Country Club, Appellants, vs. Hosoya Fireworks Co., Ltd., a foreign corporation, Appellee.	* * * * * * * * * *	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 13, 1994

Order entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

19 F.3d 1430 (Table)
Unpublished Disposition
(Cite as: 19 F.3d 1430, 1994 WL 95944 (4th Cir.(Va.)))

NOTICE: Fourth Circuit I.O.P. 36.6 states that citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel, or the law of the case and requires service of copies of cited unpublished dispositions of the Fourth Circuit.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

Jerry St. JARRE, Plaintiff-Appellant,

v.

Heidelberger DRUCKMASCHINEN, A.G., Defendant-Appellee.

No. 93-1848.

United States Court of Appeals, Fourth Circuit.

Argued Feb. 8, 1994.

Decided March 25, 1994.

Appeal from the United States District Court for the Eastern District of Virginia at Norfolk. Tommy E. Miller, Magistrate Judge. (CA-93-59-N)

Robert L. Mills, Rutter & Montagna, Norfolk, VA, for appellant.

Timothy Meade Richardson, Huff, Poole & Mohoney, P.C., Virginia Beach, VA. for appellee.

David N. Ventker, Huff, Poole & Mohoney, P.C., Virginia Beach, VA, for appellee.

E.D.V.

AFFIRMED.

Before MURNAGHAN, Circuit Judge, BUTZNER, Senior Circuit Judge, and YOUNG, Senior United States District Judge for the District of Maryland, sitting by designation.

OPINION

PER CURIAM:

I.

**1 Plaintiff, Jerry St. Jarre, allegedly injured in the operation of a printing press manufactured by defendant, Heidelberger Druckmaschinen ("HDAG"), appeals the district court's ruling that it lacked in personam jurisdiction over HDAG. We affirm.

II.

St. Jarre alleged that on February 16, 1990 he suffered serious injuries to his right hand and upper right arm while operating an offset printing press manufactured by HDAG. St. Jarre is a citizen of the Commonwealth of Virginia. HDAG is a German corporation and the accident occurred in Norfolk, Virginia.

St. Jarre alleged that HDAG had a substantial business connection with Heidelberg Eastern, Inc., a Delaware corporation which distributes products manufactured by HDAG

as well as by other manufacturers. To show that HDAG participated actively through Heidelberg Eastern in the United States Market, St. Jarre introduced a HDAG brochure published in English and three Heidelberg Eastern invoices bearing HDAG's logo. The brochure states that HDAG is the "world's leading manufacturer of printing presses" and also bears the logos of two other manufacturers whose products are distributed by Heidelberg Eastern.

The printing press that allegedly caused the accident was sold by HDAG to Heidelberg Eastern fifteen years before the accident. Heidelberg Eastern sold the press to a company in Michigan and it was later sold to a company in New Mexico. The company in New Mexico then sold the press to St. Jarre's employer in Norfolk, Virginia.

The Heidelberg Eastern invoices showed that it purchased parts from HDAG which were subsequently sold to St. Jarre's employer.

HDAG submitted affidavits, uncontradicted by evidence submitted by St. Jarre, showing that Heidelberg Eastern was a Delaware Corporation wholly owned by the East Asiatic Company, a Danish corporation. HDAG and Heidelberg Eastern share no corporate officers or directors.

St. Jarre filed the suit in the Circuit Court for the City of Norfolk on February 14, 1992 and it was removed to federal court on diversity grounds on January 26, 1993. The next day, HDAG moved to dismiss under Federal Rule of Civil Procedure 12(b)(2) for lack of personal and subject matter jurisdiction. On April 1, 1993, the district court found there was subject-matter jurisdiction based

on diversity of citizenship and granted St. Jarre permission to file an amended complaint stating with particularity the basis for personal jurisdiction. St. Jarre filed an Amended Complaint on April 9, 1993 and on April 23, 1993 HDAG filed its second motion to dismiss for lack of personal jurisdiction.

At the pretrial conference, the district court ordered that discovery commence and required St. Jarre to respond to HDAG's Motion to Dismiss on or before May 17, 1993. No discovery requests were issued by St. Jarre until the day before the scheduled hearing on the motion. At the hearing on June 10, 1993, the district court determined that it could not exercise personal jurisdiction over HDAG and denied St. Jarre's request for additional discovery.

III.

**2 This Court reviews de novo the district court's legal conclusions concerning personal jurisdiction. However, to the extent that the district court's conclusions are based on findings of fact, such findings should not be disturbed unless clearly erroneous. Mylan Laboratories, Inc. v. Akzo, N.V., 2 F.3d 56, 60 (4th Cir.1993).

When a defendant challenges personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2), the plaintiff must show by a preponderance of the evidence that jurisdiction may properly be exercised. Id. at 59-60. Courts have drawn a distinction between specific jurisdiction and general jurisdiction. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984). When the cause of action arises out of defendant's

minimum contacts to the forum specific jurisdiction is appropriate. Id. General jurisdiction is proper when the cause of action is unrelated to defendant's contacts and defendant has engaged in continuous, systematic and fairly extensive business activities within the forum. Id. at 414-416. The plaintiff seeks to base jurisdiction on defendant's specific contacts.

Plaintiff must demonstrate that the forum's long-arm statute authorizes service of process on the defendant. See Omni Capital Int'l Ltd. V [sic]. Rudolf Wolff & Co., 484 U.S. 97, 102-03 (1987); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980). St. Jarre claims that personal jurisdiction could be exercised under § 8.01-328.1(A)(1) [FN*] which provides that "[a] court may exercise jurisdiction over a person, who acts directly by an agent, as to a cause of action arising from the person's . . . [t]ransacting any business in this Commonwealth." Va.Code Ann. § 8.01-328.1(A)(1). Although only a single transaction is necessary to confer jurisdiction under the statute, under Virginia law, the plaintiff's cause of action must arise from that transaction. Peanut Corp of America v. Hollywood Brands, Inc., 696 F.2d 311, 313-14 (4th Cir.1982).

St. Jarre argues that because the machine that allegedly caused the injury was manufactured by HDAG and later sold by Heidelberg Eastern, the same transaction test of the Virginia long-arm statute is met. There is no evidence in the record of any transaction conducted by HDAG in Virginia, much less a transaction associated with the cause of action. The printing press came to Virginia, only after having been purchased from a company in New Mexico, which in turn had received the

press from a company in Michigan. That company purchased the press from Heidelberg Eastern which had purchased the press from HDAG in Germany.

St. Jarre also argues that the Virginia long-arm statute is applicable because Heidelberg Eastern, acting as HDAG's alleged alter ego, sold St. Jarre's employer a repair part for the printing press. HDAG sold the repair part to Heidelberg Eastern in Germany who subsequently sold the part to St. Jarre's employer in Virginia. This repair part was not involved in the alleged injury to St. Jarre. Further, the only evidence demonstrating an "alter ego" relationship between HDAG and Heidelberg Eastern are invoices from Heidelberg Eastern that bear the same logo that appear on the printing press manufactured by HDAG. The invoices also bear the logos of two other manufacturers and are insufficient to support St. Jarre's argument.

**3 Moreover, Heidelberg Eastern is not technically or legally owned, operated or controlled by HDAG. They share no corporate officers or directors and HDAG does not employ Heidelberg Eastern as its agent, employee, or representative. There is no evidence linking the companies in such a way as to pierce the corporate veil. See Mylan, 2 F.3d at 62-63. The Virginia long-arm statute cannot confer jurisdiction over HDAG.

Even if personal jurisdiction is authorized under the Virginia longarm statute, plaintiff must also prove that the exercise of jurisdiction on the defendant would not violate the Due Process Clause of the Fourteenth Amendment. See Omni, 484 U.S. at 102-03; World-Wide Volkswagen, 444 U.S. at 291. A manufacturer that places a

defective product in the stream of commerce through a chain of distributors may be accountable in a forum where its product causes injury to the ultimate consumer when the manufacturer has "purposefully established 'minimum contacts' in the forum State." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985).

St. Jarre claims that HDAG purposefully availed itself of Virginia law by being a world-marketer of presses. However, the mere placement of products into the stream of commerce by a nonresident defendant is not an act purposefully directed at the forum state. Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 112 (1987) (opinion of O'Connor, J.); see World-wide Volkswagen Corp., 444 U.S. at 297 ("[T]he mere likelihood that a product will find its way into the forum State" will not create personal jurisdiction.); Federal Ins. Co. v. Lake Shore, Inc., 886 F.2d 654, 658 (4th Cir.1989) ("A 'stream of commerce' theory of personal jurisdiction . . . cannot supplant the requirement that a defendant in some way purposefully avails itself of forum law.").

Neither HDAG nor Heidelberg Eastern sold the machine to St. Jarre's employer in Virginia. See De James v. Magnificence Carriers, Inc., 654 F.2d 280, 285-86 (3d Cir.) (no stream of commerce jurisdiction where defendant's product not sold in forum), cert. denied, 454 U.S. 1085 (1981); Bean Dredging Corp. v. Dredge Technology Corp., 744 F.2d 1081, 1082-85 (5th Cir.1984). After at least two other sales over the course of fifteen years the printing press arrived in Virginia. There is no evidence that HDAG designed the products for the market in Virginia, advertised in Virginia, established channels for providing regular advice to customers in Virginia, or marketed the

product through a distributor who agreed to serve as the sales agent in Virginia. See Asahi, 480 U.S. at 112. (opinion of O'Connor, J.). The exercise of personal jurisdiction over a foreign manufacturer, whose product reached the forum state because of intervening sales by third parties, would be unfair and unreasonable. See id. at 114-18.

IV.

St. Jarre also argues that if the district court had allowed more time for discovery, he would have shown that HDAG and Heidelberg Eastern were sufficiently intertwined and had sufficient contact to Virginia to support a finding of personal jurisdiction. District courts have broad discretion in resolving discovery problems that arise in pending cases. Myland, 2 F.3d at 64.

**4 HDAG first raised personal jurisdiction as an issue on January 27, 1993 in its first motion to dismiss. St. Jarre responded by representing to the court that he would conduct a "reasonable investigation" devoted to the question. The district court reserved ruling on personal jurisdiction until St. Jarre filed an Amended Complaint and ordered HDAG to raise the question of personal jurisdiction within fifteen days of service of the Amended Complaint by filing a motion to dismiss. HDAG complied with the court's order. St. Jarre did not file any discovery requests until sixteen months after he filed suit, more than four months after HDAG raised the personal jurisdiction issue and six weeks after he received HDAG's affidavits. The plaintiff had ample opportunity to take discovery and the pleading contained no specific facts that could establish the requisite contacts

with the state. The district court did not abuse its discretion.

AFFIRMED.

FN* On appeal, St. Jarre also relies on Va.Code Ann. §§ 9.01-328.1 (A)(2) and (A)(3) for purposes of personal jurisdiction. However, it is the practice of this Court not to consider arguments not raised below, absent exceptional circumstances. See, e.g., In re Johnson, 960 F.2d 396, 404 (4th Cir. 1992); Sierra Club v. Larson, 882 F.2d 128, 133-34 (4th Cir. 1989); Thurston v. United States, 810 F.2d 438, 446 (4th Cir. 1987). Here, there are no such circumstances.